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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Diane Klivington-Evans,

10 Plaintiff,

11 v.

12 PassingYourOBGYNBoards.com, et al.,

13 Defendants.
14

No. CV-24-02677-PHX-DWL

ORDER

15 Pending before the Court is Plaintiff's *ex parte* application for a temporary
16 restraining order ("TRO") and order to show cause ("OSC") as to why a preliminary
17 injunction should not issue. (Doc. 2.) For the following reasons, the TRO application is
18 granted as to Defendants, denied without prejudice as to nonparty GoDaddy, Inc.
19 ("GoDaddy"), and denied as to nonparty Domains by Proxy, LLC ("Domains by Proxy").

20 **RELEVANT BACKGROUND**

21 On October 4, 2024, Plaintiff filed a verified complaint *in rem*, alleging
22 cybersquatting by Defendants <PassingYourOBGYNBoards.com> and unknown John
23 Does. (Doc. 1.) The complaint alleges that Plaintiff has been running a business since
24 2012 via her company "PassingYourOBGYNboards.com LLC and its successor company
25 PASSINGYOUROBGYNBOARDS LLC" ("the Company"), which provides physicians
26 with "test preparation services and goods to study for their oral OB/GYN medical boards
27 to become board certified obstetricians and gynecologists." (*Id.* ¶ 2.) "Since at least as
28 early as December 17, 2014, until very recently," Plaintiff has used the domain name

1 <PassingYourOBGYNBoards.com> (“the Domain Name”) to conduct her business, but
 2 due to a missed payment caused by identity theft and the resulting closure of her credit
 3 card, Plaintiff’s registration of the Domain Name lapsed. (*Id.* ¶¶ 3-4, 54-64.) During the
 4 lapse—at some point between July 29, 2024 and August 4, 2024—one or more unknown
 5 cybersquatters registered the Domain Name, “loaded the webpage with malware and
 6 viruses,” and “used the Domain Name to reset passwords to other accounts linked to the
 7 Domain Name, including accounts at Shopify, PayPal, and Zoom.” (*Id.* ¶¶ 5-6, 65-68.)
 8 Nonparty GoDaddy is the registrar of the Domain Name. (*Id.* ¶¶ 18, 66.) Nonparty
 9 Domains by Proxy provides a mailing address “for registrants who wish to keep their
 10 information private on GoDaddy,” and this mailing address is the contact information
 11 currently listed for the Domain Name. (*Id.* ¶ 22.)

12 On the same day the complaint was filed, Plaintiff filed the pending *ex parte*
 13 application for a TRO/OSC (Doc. 2), a memorandum in support thereof (Doc. 5), and two
 14 supporting declarations (Docs. 3, 4). Plaintiff seeks a TRO enjoining Defendants from
 15 continued use of the Domain Name and associated malfeasance (Doc. 2-1 at 1-2, (1)(A)-
 16 (D)) and an OSC as to why a preliminary injunction against Defendants should not issue
 17 (*id.* at 3). Plaintiff also seeks a TRO directing GoDaddy to place a registry hold on the
 18 Domain Name and transfer it back to Plaintiff (*id.* at 2, (2)(A)-(C)) and a TRO directing
 19 Domains by Proxy to disclose the identities and contact information for the current
 20 registrant(s) of the Domain Name (*id.* at 2, (3)). Finally, Plaintiff seeks leave to serve
 21 process via alternative means. (Doc. 2-1 at 2-3.)

22 ANALYSIS

23 I. TRO Requests

24 A. **Legal Standard**

25 Under Rule 65 of the Federal Rules of Civil Procedure, a party may seek injunctive
 26 relief if it believes it will suffer irreparable harm during the pendency of an action. There
 27 are two types of injunctions available under Rule 65: TROs and preliminary injunctions.
 28 Although both are governed by the same substantive standards, *see Stuhlberg Int’l Sales*

1 *Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001), a TRO may be
 2 issued without notice to the adverse party. More specifically, under Rule 65(b)(1), the
 3 Court “may issue a temporary restraining order without written or oral notice to the adverse
 4 party or its attorney” if two requirements are met: (1) “specific facts in an affidavit or a
 5 verified complaint clearly show that immediate and irreparable injury, loss, or damage will
 6 result to the movant before the adverse party can be heard in opposition”; and (2) “the
 7 movant’s attorney certifies in writing any efforts made to give notice and the reasons why
 8 it should not be required.” The Ninth Circuit has cautioned that “very few circumstances
 9 justify the issuance of an ex parte TRO.” *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d
 10 1126, 1131 (9th Cir. 2006).

11 On the merits, “[a] preliminary injunction is an extraordinary and drastic remedy,
 12 one that should not be granted unless the movant, by a clear showing, carries the burden of
 13 persuasion.” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (cleaned up). *See also*
 14 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (“A preliminary injunction is
 15 an extraordinary remedy never awarded as of right.”) (citation omitted). “A plaintiff
 16 seeking a preliminary injunction must establish that [1] he is likely to succeed on the merits,
 17 [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that
 18 the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”
 19 *Winter*, 555 U.S. at 20. “But if a plaintiff can only show that there are serious questions
 20 going to the merits—a lesser showing than likelihood of success on the merits—then a
 21 preliminary injunction may still issue if the balance of hardships tips sharply in the
 22 plaintiff’s favor, and the other two *Winter* factors are satisfied.” *Shell Offshore, Inc. v.*
 23 *Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (cleaned up). Under this “serious
 24 questions” variant of the *Winter* test, “[t]he elements . . . must be balanced, so that a
 25 stronger showing of one element may offset a weaker showing of another.” *Lopez*, 680
 26 F.3d at 1072. Regardless of which standard applies, the movant “carries the burden of
 27 proof on each element of either test.” *Env’t. Council of Sacramento v. Slater*, 184 F. Supp.
 28 2d 1016, 1027 (E.D. Cal. 2000).

1 **B. TRO As To Defendants**

2 One of the threshold requirements under Rule 65(b)(1) when a party seeks an *ex*
 3 *parte* TRO is that the “movant’s attorney certifies in writing any efforts made to give notice
 4 and the reasons why it should not be required.” Here, Plaintiff’s counsel has provided a
 5 detailed declaration that establishes that notice has been attempted by the only means
 6 available, as the Domain Name registrants have taken affirmative steps to conceal their
 7 identities and contact information. (Doc. 4.) Furthermore, as stated in the memorandum
 8 in support of the TRO motion, “[u]nknown cybersquatters in possession of the *in rem*
 9 Defendant Domain Name has already moved registrars to, upon information and belief,
 10 prevent Plaintiff from recovering the Domain Name. . . . If given the opportunity, the
 11 cybersquatters may attempt to move the Domain Name to a registrar outside of the United
 12 States.” (Doc. 5 at 12.) The Court is satisfied that notice should not be required under
 13 these circumstances.

14 The other threshold requirement under Rule 65(b)(1) is that the movant come
 15 forward with “specific facts in an affidavit or a verified complaint [that] clearly show that
 16 immediate and irreparable injury, loss, or damage will result to the movant before the
 17 adverse party can be heard in opposition.” That requirement is satisfied here by the verified
 18 complaint (Doc. 1) as well as Plaintiff’s declaration (Doc. 3). The facts in those documents
 19 demonstrating harm to the Company’s goodwill establish both the irreparability and
 20 immediacy of the harm that Plaintiff will suffer in the absence of a TRO. *Cf. Disney*
 21 *Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017) (affirming district
 22 court’s finding that second *Winter* factor was satisfied in copyright infringement action,
 23 even though “damages could be calculated based on [lost] licensing fees,” because other
 24 forms of harm caused by the challenged conduct, including “loss of goodwill,” “cannot
 25 readily be remedied with damages”).

26 Turning to the merits, the first *Winter* factor addresses the likelihood of success on
 27 the merits. “In order to combat . . . bad-faith registration or use of domain names, Congress
 28 enacted the ACPA [Anticybersquatting Consumer Protection Act] as a supplement to the

1 federal trademark statute.” *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 295 (2d Cir.
 2 2002). “Cybersquatting can be understood as registering a domain name associated with a
 3 protected trademark either to ransom the domain name to the mark holder or to divert
 4 business from the mark holder.” *Petroliaam Nasional Berhad v. GoDaddy.com, Inc.*, 737
 5 F.3d 546, 550 n.3 (9th Cir. 2013). “The [ACPA] establishes civil liability . . . where a
 6 plaintiff proves that (1) the defendant registered, trafficked in, or used a domain name; (2)
 7 the domain name is identical or confusingly similar to a protected mark owned by the
 8 plaintiff; and (3) the defendant acted with bad faith intent to profit from that mark.” *DSPT*
 9 *Int’l, Inc. v. Nahum*, 624 F.3d 1213, 1218-19 (9th Cir. 2010) (cleaned up).

10 Here, the verified complaint and supporting declarations are easily sufficient to
 11 establish a likelihood of success on the first (Defendants “registered . . . or used a domain
 12 name”) and third (bad-faith intent to profit) elements of Plaintiff’s ACPA claim. *See*
 13 *generally Lahoti v. VeriCheck, Inc.*, 586 F.3d 1190, 1202 (9th Cir. 2009) (“Congress has
 14 enumerated nine nonexclusive factors for courts to consider in determining whether bad
 15 faith exists. We need not, however, march through the nine factors seriatim because the
 16 ACPA itself notes that use of the listed criteria is permissive. Instead, the most important
 17 grounds for finding bad faith are the unique circumstances of the case.”) (cleaned up).
 18 Plaintiff has also established a likelihood of success on one component of the second
 19 element, which is that the Domain Name be “identical or confusingly similar” to the mark
 20 owned by Plaintiff (*i.e.*, PASSING YOUR OBGYN BOARDS).

21 The only debatable question is whether the mark owned by Plaintiff is a “protected”
 22 mark, as also required to satisfy the second element. Plaintiff’s theory is that she possesses
 23 a “common law trademark” in the Company’s name. (Doc. 5 at 6.) “To establish
 24 enforceable common law trademark rights within a geographical area, a plaintiff must
 25 prove that (1) it was the first to use a mark, and (2) it has established legally sufficient
 26 market penetration. Additionally, a plaintiff must show continuing use of the mark—that
 27 is, use without interruption.” *PragmaticPlay Int’l Ltd. v. Agenpragmaticplay.live*, 2024
 28 WL 113306, *5 (D. Ariz. 2024) (cleaned up). *See also Hanginout, Inc. v. Google, Inc.*, 54

1 F. Supp. 3d 1109, 1118 (S.D. Cal. 2014) (“To establish common law trademark rights in
 2 the absence of federal registration, a plaintiff must plead and prove that it is the senior user
 3 of the mark with sufficient market penetration to preclude the defendant from using the
 4 mark in a specific geographic market. . . . [T]wo independent determinations—seniority
 5 of use and market penetration—both . . . must be satisfied in the absence of federal
 6 registration.”) (citations omitted). Here, the verified complaint establishes that Plaintiff,
 7 for about a decade, continuously ran a business known as “PASSING YOUR OBGYN
 8 BOARDS” (the “Mark”) (Doc. 1 ¶ 19), “has maintained social media pages on platforms
 9 including Facebook, YouTube, Twitter (now X) which prominently display Passing Your
 10 OBGYN Boards” (*id.* ¶ 39), and has used the Mark “on and in the Domain Name,
 11 blogposts, the Company’s Shopify and PayPal storefronts, in marketing materials, on social
 12 media accounts, in written communications to customer and potential customers, and on
 13 invoices” (*id.* ¶ 40). “Approximately 15,000 to 20,000 physicians have used the
 14 Company’s services and goods to pass their medical boards.” (*Id.* ¶ 45.) Plaintiff’s
 15 business generates approximately \$53,000 to \$110,000 in profit per year. (*Id.* ¶ 52.)
 16 Plaintiff also “founded PassingYourOBGYNboards.com LLC” in 2011. (Doc. 3 ¶ 2.)
 17 These facts are sufficient to establish a likelihood of success on, and at a minimum serious
 18 questions going to the merits of, Plaintiff’s claimed entitlement to a common law
 19 trademark. *PragmaticPlay Int’l, Ltd.*, 2024 WL 113306 at *5 (“Here, taking the
 20 Complaint’s factual allegations as true, Plaintiff has used its PRAGMATIC PLAY word
 21 mark as part of its domain name since 2015 and has actively marketed its online goods and
 22 services under both the word and composite marks since 2016. Plaintiff’s continual
 23 marketing of its games and services using such marks has [led] to significant consumer and
 24 industry recognition. This is sufficient to show that Plaintiff has common law trademark
 25 rights in the PRAGMATIC PLAY marks predating its 2021 PTO registrations.”). Thus,
 26 Plaintiff has made a sufficient showing as to the first *Winter* factor.

27 The second *Winter* factor addresses the likelihood of irreparable harm in the absence
 28 of preliminary relief. The verified complaint alleges that “[t]hrough referral sources,

1 Plaintiff has been notified that there are issues with the Domain Name being loaded with
 2 viruses, and that persons referred to Plaintiff through the website, experienced issues. After
 3 personally reviewing the Domain Name, the computer of at least one referral source was
 4 infected with a virus.” (*Id.* ¶ 68.) This is sufficient to establish irreparable harm to
 5 goodwill. *Disney Enterprises*, 869 F.3d at 866.

6 The third *Winter* factor addresses the balance of equities. The balance tips
 7 overwhelmingly in Plaintiff’s favor here, where (at least on this record) Plaintiff is an
 8 innocent victim of cybersquatting while Defendants are calculated cybersquatters who
 9 have taken steps to hide their identities and infect the computers of Plaintiff’s prospective
 10 clients with malware.

11 The fourth *Winter* factor addresses the public interest. This factor favors Plaintiff
 12 for the same reasons.

13 Finally, the Court agrees with Plaintiff (Doc. 5 at 12) that a bond is unnecessary.

14 Thus, Defendants are temporarily restrained for 14 days. Fed. R. Civ. P. 65 (b)(2).

15 C. **TRO As To GoDaddy**

16 Plaintiff is not entitled to obtain a TRO against non-party GoDaddy at this early
 17 juncture because the allegations are insufficient to establish that GoDaddy is “in active
 18 concert or participation” with Defendants. *See. e.g., Whaleco Incorporated v. Arslan*, 2024
 19 WL 342459, *2 (D. Ariz. 2024) (“Whaleco’s proposed TRO . . . goes too far . . . [because]
 20 much of the proposed TRO is directed toward non-party Namecheap Incorporated, the
 21 domain name registrar for the websites at issue. This Court previously has rejected the
 22 argument that domain registrars necessarily act in concert or participation with a client who
 23 uses a domain to commit intellectual property violations. Although a domain registrar who
 24 receives notice of [a TRO directed against the Defendants] cannot thereafter take actions
 25 that facilitate an effort by Defendants to evade or violate the TRO, the Court remains
 26 convinced that it lacks authority to order a non-party domain registrar to act before it even
 27 has notice of the injunction, and before it has been asked by any defendant to facilitate a
 28 potential violation of that order. The Court therefore denies Whaleco’s motion for a TRO

1 to the extent that it asks the Court to order Namecheap or other non-party domain registrars
 2 to act.”) (citations omitted); *Fornix Holdings LLC v. Unknown Party*, 2022 WL 992546,
 3 *2 (D. Ariz. 2022) (“Plaintiffs’ argument fails because they do not allege that . . .
 4 Namecheap knew of the defendant’s allegedly infringing conduct and nevertheless
 5 continued to provide services that facilitated that infringement. They cannot be said to be
 6 aiding and abetting the defendant, and thus, the Court cannot bind them to a TRO absent
 7 them being named parties.”).

8 The TRO as to GoDaddy is denied without prejudice. If necessary, Plaintiff may
 9 renew this request, either by motion or stipulation, *see, e.g., Wavve Americas Inc. v.*
 10 *Unknown Party*, 2024 WL 4120365, *4 (D. Ariz. 2024) (“Under the circumstances and in
 11 light of Namecheap’s actual awareness of this action and willingness to be bound, the Court
 12 sees little harm in binding Namecheap.”), although it is possible that GoDaddy, upon being
 13 shown this order, will voluntarily act to ensure that it cannot be found, through continued
 14 provision of services to Defendants, to be “in active concert or participation” with
 15 Defendants, in which case nothing further would be needed from the Court.

16 D. TRO As To Domains By Proxy

17 Plaintiff has not demonstrated that a TRO is necessary to obtain information from
 18 Domains by Proxy. Instead, the Court construes the application as a request for leave to
 19 conduct early discovery, which is granted. Plaintiff may attempt to obtain the information
 20 sought via the procedures set forth in Rule 45 of the Federal Rules of Civil Procedure. *See*
 21 *generally J.P. Morgan Securities LLC v. Chamberlain*, 2022 WL 4094151, *2 (D. Ariz.
 22 2022) (discussing the standards governing a request to conduct expedited discovery).

23 II. Service

24 “The ACPA, which was adopted in 1999, provides two different methods for the
 25 owner of a trademark or service mark to seek the transfer of an Internet domain name that
 26 is identical or confusingly similar to the owner’s mark.” *Hi-Rise Tech., Inc. v.*
 27 *Amatuerindex.com*, 2007 WL 1847249, *1 (W.D. Wash. 2007). “Under 15 U.S.C.
 28 § 1125(d)(1)—which is sometimes referred to as ‘paragraph 1’ of the ACPA—the owner

1 of a mark may bring an in personam action against a person who registers, traffics in, or
 2 uses the domain name.” *Id.* “In the alternative, 15 U.S.C. § 1125(d)(2)—also known as
 3 ‘paragraph 2’ of the statute—authorizes the owner of the mark to bring an in rem action
 4 against the domain name itself, provided that the in rem action is brought in the judicial
 5 district in which the domain name registrar or registry is located¹ and that other conditions
 6 required by the statute are satisfied.” *Id.* “Paragraph 2” provides in relevant part:

7 (A) The owner of a mark may file an in rem civil action against a domain
 8 name in the judicial district in which the domain name registrar,
 9 domain name registry, or other domain name authority that registered
 or assigned the domain name is located if—

10 (i) the domain name violates any right of the owner of a mark
 11 registered in the Patent and Trademark Office, or protected
 12 under subsection (a) or (c); and

13 (ii) the court finds that the owner—

14 (I) is not able to obtain in personam jurisdiction over a
 15 person who would have been a defendant in a civil
 16 action under paragraph (1); or

17 (II) through due diligence was not able to find a person who
 18 would have been a defendant in a civil action under
 19 paragraph (1) by—

20 (aa) sending a notice of the alleged violation and
 21 intent to proceed under this paragraph to the
 22 registrant of the domain name at the postal and
 e-mail address provided by the registrant to the
 registrar; and

23 (bb) publishing notice of the action as the court may
 24 direct promptly after filing the action.

25 (B) The actions under subparagraph (A)(ii) shall constitute service of
 26 process.

27
 28 ¹ Plaintiff alleges that “GoDaddy is the registrar of Defendant Domain Name and
 GoDaddy is located within the U.S. District Court for the District of Arizona.” (Doc. 1
 ¶ 18.)

1 15 U.S.C. § 1125(d)(2)(A)-(B).

2 The Court previously determined in a cybersquatting case where, as here, “the
3 registrant of a domain name has concealed his or her identity by registering the domain
4 name under a fictitious name and has made himself or herself impossible to find . . . and
5 there is no way to know the city or even the country in which he or she might reside,” that
6 “there is simply no manner of publication that reasonably could be expected to reach the
7 registrant. Impossibility is reason enough for the Court to decline to direct publication.
8 The Court further notes that the registrant’s efforts to make himself or herself unfindable
9 cut against imposing upon Plaintiff a burdensome publication requirement.” *Ent. USA Inc.*
10 *v. Baldinsky*, 641 F. Supp. 3d 794, 800-01 (D. Ariz. 2022).

11 The statutory definition of “due diligence” has therefore been satisfied, as Plaintiff’s
12 counsel sent a notice and intent to proceed by both email to abuse@godaddy.com and by
13 first-class mail at Domains By Proxy, LLC, 100 S. Mill Ave, Suite 1600, Tempe Arizona
14 85281, which are the postal and email address provided by the registrant to the registrar.
15 (Doc. 1 ¶¶ 20-23; Doc. 4 ¶¶ 7-9.) Plaintiff’s counsel also notified the unknown registrant(s)
16 via an alternative process. (Doc. 1 ¶¶ 24-29.)

17 Thus, service of process is deemed effected.

18 III. Order To Show Cause

19 The Court orders Defendants to show cause why a preliminary injunction should
20 not issue by filing a memorandum in opposition, not to exceed 10 pages, by October 18,
21 2024. Upon receiving a memorandum in opposition from Defendants, the Court will set a
22 preliminary injunction hearing at the earliest possible date (and will, if necessary, extend
23 the duration of the TRO for an additional 14 days). If no memorandum in opposition is
24 filed, the TRO will convert into a preliminary injunction without further order from the
25 Court.

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1 Accordingly,

2 **IT IS ORDERED** that service of process is deemed effected.

3 **IT IS FURTHER ORDERED** that Plaintiff may pursue expedited discovery from
4 Domains By Proxy to ascertain Defendants' identities and contact information.

5 **IT IS FURTHER ORDERED** that Plaintiff's request for an *ex parte* TRO (Doc.
6 22) as to Domains by Proxy is **denied**.

7 **IT IS FURTHER ORDERED** that Plaintiff's request for an *ex parte* TRO (Doc.
8 22) as to GoDaddy is **denied without prejudice**.

9 **IT IS FURTHER ORDERED** that Plaintiff's request for an *ex parte* TRO and
10 OSC (Doc. 22) as to Defendants is **granted**.

11 **IT IS FURTHER ORDERED** that Defendants shall show cause why a preliminary
12 injunction should not issue by filing a memorandum in opposition, not to exceed 10 pages,
13 by **October 18, 2024**. Upon receiving a memorandum in opposition from Defendants, the
14 Court will set a preliminary injunction hearing at the earliest possible date (and will, if
15 necessary, extend the duration of the TRO for an additional 14 days).

16 **IT IS FURTHER ORDERED** that, for a period of 14 days, Defendants are
17 prohibited from:

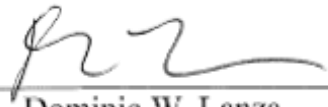
- 18 1. creating, operating, owning, overseeing, or otherwise exercising control over
19 any infringing website, web page, or parked page, incorporating, including, or
20 otherwise displaying the trademark PASSING YOUR OBGYN BOARDS; and
- 21 2. registering, using, linking, transferring, selling, exercising control over, or
22 otherwise owning the domain name or any other domain name that uses
23 "PassingYourOBGYNBoards" or Plaintiff's name; and
- 24 3. effecting any assignment or transfer, forming new entities or associations, or
25 utilizing any other device for the purpose of circumventing or otherwise
26 avoiding any of the prohibitions set forth in this Order; and
- 27 4. impersonating the Company, or otherwise interfering with the Company's social
28 media accounts, customers, e-commerce accounts, point of sale accounts and/or

1 payment platforms.

2 **IT IS FURTHER ORDERED** that if Defendants fail to respond to the OSC by
3 **October 18, 2024**, the restrictions above shall constitute a preliminary injunction that shall
4 remain in effect throughout the pendency of this litigation.

5 **IT IS FURTHER ORDERED** that Plaintiff shall serve Defendants with this order
6 via email to abuse@godaddy.com and by first-class mail to Domains By Proxy, LLC, 100
7 S. Mill Ave, Suite 1600, Tempe, Arizona 85281 and file a notice on the docket when
8 service of this order is completed.

9 Dated this 8th day of October, 2024.

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12 _____
13 Dominic W. Lanza
14 United States District Judge
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